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No. 97-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CASSANDRA JENKINS, a minor, by her mother, SANDRA HALL, and ONEIKA MCKENZIE, a minor, by her mother, ELIZABETH MCKENZIE,
Petitioners,

vs.

SUSANNAH HERRING and MELBA SIRMON,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard employed by the Eleventh Circuit Court of Appeals in determining whether the law is clearly established for qualified immunity purposes conflicts with decisions of this Court and other courts of appeals?

2. Whether the circuit court's holding that *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), did not clearly proscribe the actions of Herring and Sirmon such that they should be stripped of qualified immunity conflicts with decisions of this Court and other courts of appeals?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Susannah Herring and Melba Sirmon respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions raised by the Petition for Writ of Certiorari involve qualified immunity under 42 U.S.C. § 1983. The underlying claims asserted in the complaint are based on the Fourth Amendment.

STATEMENT OF THE CASE

I. The Alleged Search

In 1992, petitioners Cassandra Jenkins and Oneika McKenzie were second grade students in the Talladega City School District. (Pet. App. 3A) Near the end of the school day on May 1, 1992, a classmate of Jenkins and McKenzie informed their teacher, Hilda Fannin, that seven dollars was missing from her purse. (Id.) Fannin asked her class if anyone knew where the money might be found. Another of Jenkins' and McKenzie's classmates told Fannin that Jenkins had taken the money and placed it in McKenzie's backpack. (Pet. App. 3A) Fannin searched McKenzie's backpack, but did not find the money. (Pet. App. 3A)

Two more students accused Jenkins and McKenzie of the theft. (Id.) While Fannin was questioning McKenzie and Jenkins in the hallway, each accused the other of taking the money. (Id.) Jenkins and McKenzie then jointly accused another student, Anthony Jamerson, of the theft. (Pet. App. 40A)

While Fannin was questioning the students in the hallway, respondent Susannah Herring approached. (Pet. App. 40A) Herring told Fannin that the students might have hidden the money in their socks or their shoes and instructed them to remove their shoes and socks. (Pet. App. 3A) When no money was found, Fannin informed Herring that McKenzie had repeatedly asked and had been given permission to go to the restroom after the regular restroom break. (Pet. App. 63A)

Respondent Melba Sirmon, the guidance counselor, entered the hallway and accompanied Herring, Jenkins and McKenzie to the girls' restroom. (Pet. App. 3A) In the restroom, Herring told Jenkins and McKenzie that they needed to check their clothes. (Pet. App. 40A) Jenkins and McKenzie entered separate stalls and locked the doors behind them. (Pet. App. 41A) Jenkins and McKenzie offered conflicting testimony as to the actions taken in the restroom. (Pet. App. 41A) Jenkins testified that Herring asked her and McKenzie to go into separate stalls and come out with their panties down. (Pet. App. 3A) Jenkins testified that she and McKenzie came out of the stalls with their panties around their ankles, then returned to the stalls and pulled their panties up.[1] McKenzie testified that neither she nor Jenkins ever exited the stalls with their panties down.[2] (Pet. App. 3A)

Herring and Sirmon took Jenkins, McKenzie and Jamerson to the office of the principal, Crawford Nelson.[3] (Pet. App. 4A) When Nelson asked the students to reveal the location of the money, Jamerson told Nelson that the money was located behind a file cabinet in their classroom. (Id.) A search behind the file cabinet failed to uncover the money. (Id.)

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[1] On one occasion, Jenkins testified that she was required to remove her dress in Sirmon's office.

[2] Both Jenkins and McKenzie kept their dresses on while they were in the restroom.

[3] Herring and Sirmon assert that this was the only visit to Nelson's office on May 1, 1992.

Jenkins and McKenzie allege that Herring and Sirmon took them back to the girls' restroom a second time. (Id.) A parent of another student testified that she stepped into the restroom and saw the girls, one in her panties and the other wearing a slip. Testimony offered by Jenkins and McKenzie is inconsistent with that of the parent who alleges she saw the girls in the restroom. Jenkins testified in her deposition that no one came into the restroom while she was in there with her dress off. (R3-74-Ex1-77) McKenzie testified that she did not see anyone walk by the restroom while she was in there. (R3-74-Ex2-57)

II. Board Findings and Findings of the Office for Civil Rights

After an investigation, the Talladega City Board of Education resolved to consider the cancellation of Herring's employment contract and suspended her pending action on the recommended termination. (Pet. App. 42A) After considering evidence submitted at Herring's termination hearing, the Board concluded that Jenkins and McKenzie had not been strip searched, but that Herring and Sirmon had exercised questionable judgment in handling the investigation. (Pet'r. C.A. App. 44-47, 55-58)

In September of 1992, the Office for Civil Rights investigated Jenkins' and McKenzie's allegations that they had been strip searched. In its Letter of Findings, OCR concluded that the evidence did not substantiate that Jenkins and McKenzie had been strip searched. (Pet'r C.A. App. 138-145) First Brief in Support of Motion for Summary Judgment, Evidentiary Attachments, pp.30- 37)

III. Procedural History

The parents of Jenkins and McKenzie filed a complaint on their behalf against the Talladega City Board of Education and nine individual defendants, including Herring and Sirmon. The complaint alleged that Jenkins and McKenzie had been strip

searched in violation of their Fourth and Fourteenth Amendment Rights and sought damages pursuant to 42 U.S.C. §1983.[4]

Herring and Sirmon moved for summary judgment on the basis of qualified immunity. Though the district court initially denied Herring and Sirmon qualified immunity (R2-27), the court subsequently reconsidered its decision. (R2-39) According to the district court:

> The law was not clearly established in the Eleventh Circuit with regard to the conduct at issue. There is no "bright line." There is no reasonable inference that these defendants were plainly incompetent or that they knowingly violated clearly established law. This court concludes that it over credited *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), and a Supreme Court footnote.[5]

(R2-39) The district court granted summary judgment in favor of Herring and Sirmon on the basis of qualified immunity (R2-40).

A panel of the Eleventh Circuit Court of Appeals, over Judge Birch's strong dissent, reversed the district court and held that Fourth Amendment law was sufficiently clear in 1992 to put Herring and Sirmon on notice that their actions were unconstitutional. (Pet. App. 45A)

In his dissent, Judge Birch stressed his belief that, on May 1, 1992, "there was no binding, clearly established law that these school teachers violated in conducting the challenged strip

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[4] The district court's dismissal of Jenkins' and McKenzie's several other claims was upheld by the court of appeals. (Pet. App. 4A) Jenkins and McKenzie do not seek review of those claims in this Court. (Pet. App. 4, n.3)

[5] The district court, in its reference to *Cornfield v. Consolidated High School Distr. #230*, 991 F.2d 1316 (7th Cir. 1993), suggested that *Doe v. Renfrow* had not clearly established the law at the time of the events giving rise to this action.

searches." (Pet. App. 73A) Judge Birch disagreed with the majority's reliance on *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), "because *T.L.O.* is not factually similar to the strip searches that we review and cannot be clearly established law to resolve this case...." (Pet. App. 75A)

The Eleventh Circuit Court of Appeals decided to rehear the case en banc and vacated the previous panel's opinion. (Pet. App. 84A-85A) The en banc court held that Herring and Sirmon are entitled to qualified immunity because on May 1, 1992:

> [T]he law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible.

(Pet. App. 21A) The en banc court of appeals rejected the argument advanced by Jenkins and McKenzie that, on May 1, 1992, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), so clearly defined the law regarding the constitutionally permissible scope of a search of students that Herring and Sirmon were on notice that their conduct violated Jenkins' and McKenzie's rights under the Fourth Amendment. (Pet. App. 5A-6A) The court noted that Jenkins and McKenzie did not contest that "under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis." (Pet. App. 6A, n.1)

In concluding that *T.L.O.* did not clearly establish the law on student searches such that Herring and Sirmon were on notice that their conduct was constitutionally impermissible, the en banc court emphasized the general nature of the "reasonableness under all the circumstances" standard set forth in *T.L.O.* (Pet. App. 16A) The court noted that, although *T.L.O.* identifies factors to consider in defining the permissible scope of a school search, "there is no illustration, indication, or hint as to *how* the

enumerated factors might come into play when other concrete circumstances are faced by school personnel." (Pet. App. 9A-10A) The en banc court also noted the absence of "practical, fact based application" of the *T.L.O.* standard to facts materially similar to those of the search in this case: "School officials cannot be required to construe *general, legal formulations* that have not once been applied to a specific set of facts by any binding judicial authority." (Pet. App. 14A-16A) (Emphasis added.)

Finally, the en banc court opined that the absence from *T.L.O.* of a narrowly defined reasonableness test appears deliberate and "further suggests that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" (Pet. App. 20A) The court held that *T.L.O.* did not clearly establish the law on student searches:

> Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants — or, more accurately, all reasonable educators standing in defendants' place — should have known that their conduct violated a clearly established constitutional right.

(Pet. App. 20A)

Judge Kravitch, joined by Chief Judge Hatchett and Judge Barkett, dissented. The dissent concluded that, despite *T.L.O.*'s general test, and in the absence of prior, factually similar cases, *T.L.O.* nonetheless would have made it obvious to Herring and Sirmon that their actions were unconstitutional. (Pet. App. 21A)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' STANDARD FOR DETERMINING WHETHER THE LAW IS CLEARLY ESTABLISHED FOR QUALIFIED IMMUNITY PURPOSES DOES NOT CONFLICT WITH DECISIONS OF THIS COURT. FURTHER, THOUGH THERE IS SOME CONFLICT AMONG THE CIRCUITS AS TO THE RELEVANCE OF NON-BINDING PRECEDENT IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED, THE ELEVENTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH THAT OF SEVEN OTHER CIRCUITS.

A. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established for qualified immunity purposes does not conflict with this Court's decision in *U.S. v. Lanier.*

The petitioners assert that the court of appeals employed "an overly expansive interpretation of qualified immunity" in concluding that the law pertaining to student searches had not been developed in a concrete, factually similar context so as to put educators on notice that their conduct was constitutionally impermissible. (Pet. App. 12) The petitioners argue that the level of factual specificity required by the Eleventh Circuit in determining whether the law was clearly established was rejected by this Court in *United States v. Lanier*, 117 S.Ct. 1219 (1997).[6]

[6] The petitioners also assert that the level of factual specificity required by the Eleventh Circuit is inconsistent with this Court's holding in *Anderson v. Creighton*, 483 U.S. 635 (1987). (Pet. App. 12) The respondents submit that the Eleventh Circuit's principles of qualified immunity fully comport with, and are based on, those set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Anderson v. Creighton*, 483 U.S. 635 (1987). *See infra Point I.B.*

Lanier involved a challenge to a criminal conviction under 18 U.S.C. §242, the criminal law counterpart to 42 U.S.C. §1983. 73 F.3d 1380. In *Lanier*, a judge's conduct in sexually assaulting several women was alleged to give rise to a criminal civil rights violation. (Id.) In an en banc decision, the Sixth Circuit reversed the judge's criminal conviction, concluding that 18 U.S.C. §242 did not provide adequate notice that sexual assault by a state actor fell within the scope of constitutionally prohibited conduct. *Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996) (en banc). The Sixth Circuit held that "a generally phrased constitutional right" has been "made specific" only if a prior decision of the Supreme Court has declared the right, and then only when the Supreme Court has applied its ruling in a case with facts "fundamentally similar to those being prosecuted." 73 F.3d at 1393.

This Court granted certiorari "to review the standard for determining whether particular conduct falls within the range of criminal liability under §242." *Lanier*, ___ U.S. ____, ____, 117 S.Ct. 1219, 1224. In *Lanier*, the Court rejected the glosses added by the Sixth Circuit, specifically, that a prior decision of the Supreme Court must have declared a right and that the Supreme Court must have applied its ruling declaring such right in a case with facts fundamentally similar to the case at issue. The Court also concluded that the "made specific" standard is essentially the same as the clearly established standard employed in qualified immunity cases rather than the heightened standard set forth by the court of appeals.. *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227-28.

The petitioners assert that the standard employed by the Eleventh Circuit Court of Appeals in determining whether the law was clearly established for qualified immunity purposes is "essentially identical" to the "made specific" standard set forth by the Sixth Circuit Court of Appeals in *Lanier*. This assertion is plainly false. The Eleventh Circuit does not require, in order that the law be clearly established, that a prior decision of the

Supreme Court have declared the right at issue and that the Supreme Court have applied its ruling on such right in a case with facts fundamentally similar to the case before the court. The Eleventh Circuit simply does not employ this heightened standard. Because the Eleventh Circuit does not employ the standard rejected by this Court in *Lanier*, there can be no conflict between the Eleventh Circuit and *Lanier* in this regard.

The petitioners also argue that the Eleventh Circuit's requirement that, for the law to be clearly established, prior law must have been developed in a concrete and factually defined context, conflicts with this Court's holding in *Lanier*. (Pet. App. 13) *Lanier*, in equating the "made specific" standard and the "clearly established" standard, stated that criminal liability may be imposed for deprivation of a constitutional right "if, but only if, in light of preexisting law, the unlawfulness under the Constitution is apparent." *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227-28. This statement is consistent with this Court's decisions in the qualified immunity context. See *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). The Eleventh Circuit's standard for determining whether the law is clearly established for qualified immunity purposes, based on this Court's qualified immunity decisions, in no way differs from the standard set forth in Lanier. As such, there is no conflict.

To the extent the petitioners argue that this Court's commentary in *Lanier* regarding general propositions of law displaces this Court's rulings in its qualified immunity decisions, such argument also fails. In *Lanier*, the Court stated:

> General statements of the law are not inherently incapable of giving fair and clear warning, and, in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

Lanier, ___ U.S. at ____, 117 S.Ct. at 1227. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established for qualified immunity purposes is not inconsistent with these comments.

The Eleventh Circuit's standard for determining whether the law is clearly established, based on this Court's decisions in the qualified immunity context, does not require that the *very action in question* previously have been held unlawful. *Lanier*, 117 S.Ct. 1219, 1227. The Eleventh Circuit's standard is commensurate with this Court's holding in *Anderson v. Creighton*, which requires:

> The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates the right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of preexisting law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640. See *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc).

The Eleventh Circuit's requirement that prior case law must be "particularized" and must make the unlawfulness of the conduct at issue apparent fully comports with this Court's decision in *Anderson*. The principles set forth in *Anderson* are the very principles addressed in *Lanier*. As such, it cannot be said that the en banc court's qualified immunity standard is contrary to the spirit or the letter of *Lanier*."[7]

[7] As this Court noted in *Lanier*, "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may

(Footnote 7 continued on next page)

The petitioners also attempt to fashion a conflict with this Court's decision in *Lanier* by asserting that the Eleventh Circuit's approach to assessing whether the law is clearly established is "in tension" with this Court's approach as set forth in *Lanier*. (Pet. App. 15) Contrary to the argument advanced by petitioners, the Eleventh Circuit's holding that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state" (Pet. App. 14A, n.4) (citing *Hamilton v. Cannon*, 80 F.3d 1525, 1532, n.7 (11th Cir. 1996); *Courson v. McMillan*, 939 F.2d 1479, 1497-1498, n.32 (11th Cir. 1991) does not conflict with this Court's holding in *Lanier*.

The petitioners argue that *Lanier* rejects a rule, such as that employed by the Eleventh Circuit, prohibiting consideration of decisions of other courts of appeals or other courts in determining whether the law has been clearly established. In *Lanier*, this Court specifically rejected the Sixth Circuit's holding that only Supreme Court precedent could "make specific" the law for purposes of 18 U.S.C. §242 and that no other decisions could be considered. *Lanier* did not address the extent to which decisions of other courts must, should, or may be considered in determining whether the law has been clearly established.[8] (Pet. App. n.4)

(Footnote 7 continued)

be necessary." *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227 (citing *Mitchell v. Forsyth*, 472 U.S. 411 (1985)). Such is precisely the case the en banc court was confronted with in considering the permissible scope of student searches under *New Jersey v. T.L.O.* The "reasonableness under the circumstances" standard set forth in *T.L.O.* expressly left open the question whether a search of a student accused of stealing money would violate the Constitution. As such, the Eleventh Circuit sought a higher degree of prior factual particularity.

[8] In *Harlow*, this court did not address "the circumstances under which 'the state of the law' should be 'evaluated' by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court." *Harlow v. Fitzgerald*, 457 U.S. 818, n.32 (quoting *Procunier v. Navarette*, 434 U.S. 565, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978))

Further, the *Lanier* Court did not conclude that there was any impropriety in considering only the decisions of the circuit or the highest court of the state in which the relevant events took place. (Pet. App. n.4) As such, there is no tension between the en banc court's holding as to the precedent it will consider and the precedent addressed in *Lanier*.

Because the Eleventh Circuit Court of Appeals' en banc holding does not conflict with *Lanier*, there is no basis for the granting of certiorari on this issue.

B. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established comports with this Court's decisions concerning qualified immunity.

The petitioners assert that the Eleventh Circuit's standard for determining whether the law is clearly established in the qualified immunity context "seriously misconstrues this Court's qualified immunity decisions." (Pet. App. 11) The petitioners submit that the Eleventh Circuit requirement that case law "establish the right in concrete, factually defined circumstances that are materially similar to the case at hand" is improper. (Pet. App. 11) The en banc court's holding fully comports with this Court's qualified immunity decisions.

In *Harlow v. Fitzgerald*, this Court held:

> [I]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law *forbade* conduct not previously identified as unlawful.

475 U.S. 800, 818 (1982) (Emphasis added.)

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court emphasized that the *Harlow* court "refashioned" the doctrine of qualified immunity such that

immunity would be an entitlement to government officials "where the legal norms the officials are alleged to have violated were not clearly established at the time." 472 U.S. 526 According to this Court, the question of qualified immunity is a truly legal one: whether the legal norms allegedly violated were clearly established at the time of the challenged actions or whether the law *clearly proscribed* the actions at issue. 472 U.S. 528 (Emphasis added.)

This Court, in *Anderson v. Creighton*, addressed the degree of factual specificity necessary to clearly establish the law:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Anderson at 639. *Anderson* made clear that "the right the official is alleged to have violated must have been "clearly established" in a more *particularized,* and hence more relevant, sense." 483 U.S. at 640. (Emphasis added.) As this Court stated in *Anderson*, "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates the right." *Id.* While *Anderson* does not require that "the

very action in question" be previously held unlawful, "in the light of pre-existing law, the unlawfulness must be apparent." *Id.*

The principles of qualified immunity set forth by the Eleventh Circuit Court of Appeals in *Lassiter v. A&M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc) and *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563 (11th Cir. 1992) (Edmondson, J. dissenting) (adopted en banc 998 F.2d 923 (11th Cir. 1993)) (per curium) fully comport with and are based on those principles espoused by this Court. In *Lassiter*, the Eleventh Circuit, citing *Anderson v. Creighton*, stated:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing violates federal law.

Lassiter v. Alabama A&M Univ., at 3116 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The court of appeals in *Lassiter* emphasized that, "[W]hen considering whether the law applicable to certain facts is clearly established, the facts of the cases relied upon as precedent are important." *Lassiter* at 3116. Though the Eleventh Circuit does not require the facts to be identical to the facts of the case before it, the Court does require that the facts be "materially similar." *Id.*

The principles employed by the Eleventh Circuit Court of Appeals in determining the availability of qualified immunity fully comport with this Court's decisions in the qualified immunity context. The Eleventh Circuit's qualified immunity standard does not require "a level of factual specificity in the articulation of a constitutional right that this Court has rejected." Based on the foregoing, it is evident that the Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established fully comports with this Court's decisions

concerning qualified immunity. As such, there is no basis for the granting of certiorari on this issue.

C. Though there is some conflict among the circuits as to the relevance of NON-BINDING precedent in determining whether the law was clearly established, the Eleventh Circuit's holding is not in conflict with that of seven other circuits.

The petitioners argue that the Eleventh Circuit's holding with regard to the relevance of non-binding authority in determining whether the law is clearly established conflicts with decisions of seven other circuits in that the Eleventh Circuit precludes the consideration of NON-BINDING precedent as relevant authority. According to the petitioners, the Second, Fifth and Eleventh Circuits hold that only binding precedent should be consulted. (Pet. App. 16) This argument necessarily fails because the Eleventh Circuit *does* consult non-binding precedent in the qualified immunity context. Except in matters concerning state law, decisions of the highest court of the state where a case arises are not binding on the Eleventh Circuit Court of Appeals. Nonetheless, in *Courson v. McMillan*, 939 F.2d 1479, 1497-98, n.32 (11th Cir. 1991), the Eleventh Circuit included these state court decisions among those decisions relevant to its clearly established law analysis. As such, the Eleventh Circuit's holding does not conflict with the decisions of seven other circuits.[9]

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[9] There is a question as to whether petitioners' arguments in this respect are properly raised here. As the en banc court concluded,

> The parties agree that, at the time the events giving rise to this action occurred, *T.L.O.* was the only case that had addressed with any specificity the Fourth Amendment implications of school searches. As a result, it is uncontested that, under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis.

(Pet. App. 6A, n.1)

Though the petitioners argue that there is a "sharp and genuine circuit conflict" on the issue of relevant decisions, they fail to establish that the application of different standards among the circuits has made any significant difference in the outcome of relevant decisions. The petitioners assert that, as of May 1992, the decisions from other jurisdictions concerning school searches, taken together, made clear the petitioners' rights in this case. (Pet. App. 18) According to the petitioners, "Under the standard of virtually any other Circuit but the Eleventh, Second, and Fifth, respondents in this case would not have been entitled to qualified immunity." *Id.* This assertion is both speculative and unfounded.

The petitioners argue that had the Eleventh Circuit considered non-binding precedent as relevant, respondents in this case would not have been granted qualified immunity. *Id.* As stated above, the Eleventh Circuit does consider NON-BINDING precedent as relevant in the qualified immunity context. Nonetheless, the Eleventh Circuit's consideration of non-binding precedent would not necessarily result in a denial of qualified immunity to the respondents. Further, the same might be true of the First Circuit. In *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), the First Circuit held that it was not limited to Supreme Court cases in determining whether the law was clearly established. *Bonitz* at 171, n.8. The Court noted that it can consider opinions of the courts of appeals and of the local District Court. *Id.* Given the First Circuit's preclusion of certain non-binding precedent, namely, state law, it does not follow that under this Court of Appeals' standard "respondents in this case would not have been entitled to qualified immunity." Further, while a decision might be relevant to a court's qualified immunity analysis, such decision will not necessarily clearly establish the law.[10] Because the petitioners are unable to establish that the Eleventh Circuit is in

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[10] For example, a non-binding decision might not be factually similar to the case before a court.

conflict with seven others, and because they are unable to show that the application of different standards among the circuits has had a significant impact on resultant cases, the issuance of a writ of certiorari is not warranted.

D. To the extent the petitioners seek to have this Court speak to the merits of this case, such is not properly before this Court.

The petitioners submit that clarification of the qualified immunity standards at issue is "of substantial importance to the enforceability of constitutional rights." (Pet. App. 19) The respondents submit that such argument is not appropriately before this Court.

Qualified immunity is "conceptually distinct" from the merits of the petitioners' claims that their rights have been violated. *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed. 411, 105 S.Ct. 2806. Because the only question before the Eleventh Circuit was the qualified immunity issue, not the merits of the case, presentation of an argument on the merits is improper.[11]

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[11] Even if this argument were properly before the Court (that courts will seldom reach the question of whether conduct was unconstitutional), the respondents submit that the petitioners' assertion is not persuasive. Public officials sued in their individual capacities may fail to raise the defense of qualified immunity, a board of education might be named the sole defendant in a lawsuit, school personnel might be sued in their official capacities only, and trial judges might refuse to certify qualified immunity questions for immediate appeal.

II. THE EN BANC COURT OF APPEALS' HOLDING THAT *NEW JERSEY V. T.L.O.* DID NOT CLEARLY PROSCRIBE THE ACTIONS OF HERRING AND SIRMON SUCH THAT THEY SHOULD BE STRIPPED OF QUALIFIED IMMUNITY DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The en banc decision of the Eleventh Circuit Court of Appeals does not conflict with *New Jersey v. T.L.O.*

The en banc court of appeals held that on May 1, 1992, "The law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible." (Pet. App. 21A) The en banc court rejected the argument, raised here by petitioners, that *New Jersey v. T.L.O.* clearly defined the law regarding the constitutionally permissible scope of student searches such that the respondents were on notice that their conduct violated petitioners' rights. (Pet. App. 5A-6A)[12]

It is important to note at the outset that the facts in *T.L.O.* are not remotely factually similar to those faced by the en banc court. *T.L.O.* involved juvenile proceedings relating to evidence gleaned on a search of T.L.O.'s purse by school officials. T.L.O., a high school student, was accused of violating a school rule prohibiting smoking in the restroom. The case at hand involves the alleged strip search of two elementary school students accused of stealing seven dollars. The facts of *T.L.O.* are too different from the case at hand to have put the respondents on notice that their actions were unlawful.

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[12] The Eleventh Circuit noted in its opinion that petitioners did not contest that "under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis." (Pet. App. 6A, n.1)

In *T.L.O.*, this Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by school officials. 469 U.S. 325 at 333. This Court made clear, however, that its application was somewhat diluted in that certain of the restrictions usually applicable to searches conducted by public officials would be eased. Specifically, the Court ruled that school officials would not be required to obtain warrants in order to search students, nor would they be required to base searches on probable cause. *Id.* at 340-341. This Court reasoned that the legality of the student search should depend on the "reasonableness under all the circumstances" of the search. *Id.* at 341.

The *T.L.O.* court set forth a test for determining the reasonableness of a search:

> [F]irst, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Id. at 341. A search is "justified at its inception" where a school official has reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or school rules. *Id.* at 341-42. A search is permissible in scope where the measures adopted are reasonably related to the objectives of the search and are not too intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342.

In concluding that *T.L.O.* did not clearly establish the law on student searches such that Herring and Sirmon were on notice that their conduct was constitutionally impermissible, the en banc court emphasized the general nature of the "reasonableness under all the circumstances" standard set forth in *T.L.O.* (Pet. App. 16A) Although *T.L.O.* identifies factors to consider in

defining the permissible scope of a school search, "there is no illustration, indication, or hint as to *how* the enumerated factors might come into play when other concrete circumstances are faced by school personnel." (Pet. App. 9A-10A) The en banc court also noted the absence of "practical, fact based application" of the *T.L.O.* standard to facts materially similar to those of the search in the present case.

The absence from *T.L.O.* of a narrowly defined reasonableness test appears deliberate and "further suggests that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" (Pet. App. 20A) *T.L.O.* did not clearly establish the law on student searches:

> Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants — or, more accurately, all reasonable educators standing in defendants' place — should have known that their conduct violated a clearly established constitutional right.

(Pet. App. 20A) Justice Stevens speaks to this in his dissent in *T.L.O.*:

> The court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults privacy, only creates uncertainty in the extent of its resolve to prohibit the latter.

469 U.S. 325 at 381. Stevens, J. concurring in part and dissenting in part. Justice Brennan also referred to the reasonableness standard as "unclear" and "unguided balancing test" and "amorphous balancing test" and a "cursory and short sighted test."

T.L.O. at 363-370 (Brennan, J. concurring in part and dissenting in part.) Justice Brennan predicted that "the reasonableness under all the circumstances test will leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation." *Id.* at 367.

The reasonableness under all the circumstances test set forth in *T.L.O.* is nothing more than an abstract, general proposition which provides absolutely no instruction to school officials as to the permissible scope of student searches. *T.L.O.*'s application of this standard does nothing more than given an example of what *might* constitute a *reasonable* search in the school setting.

Finally, it is relevant that other circuits have also concluded that *T.L.O.* did not clearly establish Fourth Amendment law on student searches. In *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991), the Sixth Circuit commented that "the reasonableness standard articulated in *New Jersey v. T.L.O.* has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. §1983 cause of action." In 1993, the Seventh Circuit — the same court that decided *Doe v. Renfrow*, 631 F.2d 991 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), commented on "the nebulous standards governing student searches." *Cornfield by Lewis v. Consolidated School District No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993). Further, if *T.L.O.* had clearly established the law on *all* student searches, there would have been no need for the Supreme Court to decide in 1995, in *Vernonia School District 47J v.. Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995) that a school district's policy authorizing urinalysis drug testing of student athletes did not violate the Fourth Amendment.

In its en banc decision, the Eleventh Circuit, pursuant to the qualified immunity principles espoused by this Court, concluded that *T.L.O.* did not clearly establish the law on student searches such that the respondents should be stripped of quali-

fied immunity. The court's finding that the law was not clearly established does not conflict with *T.L.O.* because the facts in the cases are completely different. Further, the general nature of the reasonableness under all the circumstances standard set forth in *T.L.O.*, coupled with a complete lack of factual similarity, precludes a finding of clearly established law. While *T.L.O.* identifies factors an official is to consider in defining the scope of a student search, *T.L.O.* does not demonstrate how said factors might come into play in different circumstances. Because the Eleventh Circuit was appropriate in its determination that *T.L.O.* did not clearly establish the law, and because this determination cannot be said to constitute a conflict, none can be said to exist between the Eleventh Circuit and this Court. It follows that there is no basis for the granting of certiorari on this issue.

B. The Eleventh Circuit's decision does not conflict with decisions of the Sixth and Seventh Circuits or the Supreme Court of West Virginia.

The petitioners argue that decisions from the Sixth and Seventh Circuits and the Supreme Court of West Virginia conflict with the en banc decision in that decisions of these courts recognize a clearly established right of students not to be strip searched for minor infractions. (Pet. App. 27-28) This argument fails for several reasons.

First, none of the decisions cited by the petitioners are even *remotely* factually similar to the present case. In *Doe v. Renfrow*,[13] after the entire student body was subjected to drug detecting canines and a dog alerted to her, one of the plaintiffs was searched by school officials. 631 F.2d 91-92 (7th Cir. 1980). In *Cornfield* v. *Consolidated High School Distr. No. 230.*, a sixteen

[13] *Doe v. Renfrow*, a 1980 case, cannot be said to have clearly established the law on student searches. This case was decided five years before *T.L.O.*, at which time there was a question as to whether the Fourth Amendment applied to student searches at all.

year old student was suspected of crotching drugs. Despite the refusal of the student's parent to consent to a strip search, two male school officials conducted the search. 991 F.2d 1316, 1319 (7th Cir. 1993) In *Williams* v. *Ellington*, a female high school student suspected of using drugs was subjected to a strip search by a female school official. 936 F.2d 881, 883 (6th Cir. 1991) Finally, in *State ex rel. Galford v. Mark Anthony B.*, a fourteen year old male accused of theft was subjected to a search. 433 S.E.2d 41, 42-43 (W.Va. 1993) In *Galford*, no one implicated the student in the theft — the school social worker happened upon information that the student had been in the classroom where the money was stolen. *Id.* at 42.

While the petitioners assert that these decisions recognize a clearly established right of students not to be strip searched for minor infractions, such is not the case. The strip search in *Doe* was struck down because it was executed without any individualized suspicion and without reasonable cause. *Doe* at 92. See *Cornfield v. Consolidated* at 1324. ("Our sharp condemnation of the conduct of the school officials in [*Doe*] stems from the fact that the strip search of Doe was executed without any individualized suspicion and without reasonable cause.") The strip search in *Cornfield* was deemed reasonable in that it was justified at its inception because there were enough personal observations to create a reasonable suspicion that the student was crotching drugs. The search was permissible in scope because, although the student was sixteen and more self-conscious, two males performed the search, and the search was conducted in the boy's locker room where no one saw him and there was no touching.[14] *Cornfield* at 1323. The search of the high school

[14] The court in *Cornfield* commented that a school board would not be held accountable for a failure to train its employees with respect to student searches. According to the court, "Given the nebulous standards governing student searches, school districts and school district administrators cannot be held accountable on this ground because the particular constitutional duty at issue is not clear." *Cornfield* at 1327.

female suspected of using drugs by a female school official at issue in *Williams* was upheld as reasonable. In *Williams*, the court looked to the school's search policy, which provided:

> [A] pupil's person will not be searched unless there is a reasonable suspicion that the pupil is concealing evidence of an illegal act . . . . When a pupil's person is searched, the person conducting the search shall be the same sex as the pupil; and a witness of the same sex shall be present during the search.

Id.[15] In *Galford*, the search of a fourteen year old male suspected of theft, where no one implicated the student, was deemed unreasonable.[16]

The above cases cannot be said to have put the respondents on notice that their actions on May 1, 1992, violated the Constitution. Only *Doe* and *Williams* had been decided in May 1992, and neither involved a search of an elementary school student suspected of theft. To the extent the petitioners argue the above cases should have compelled the Eleventh Circuit to conclude the respondents' actions were unconstitutional, such argument

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[15] The *Williams* court noted:

> [A] diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.* has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. §1983 cause of action.

Williams at 886. The *Williams* court also emphasized the *T.L.O.* court's attention to protecting the right of school officials to make discretionary decisions. *Id.*

[16] In *Galford*, the Supreme Court of West Virginia commented that "the United States Supreme Court has never decided a case which involved a strip search of students, nor did the *T.L.O.* court indicate whether its reasonableness standard would apply to strip searches of students." *Galford* at 45.

necessarily fails because not one of the above cases is even remotely factually similar to the present case. The Eleventh Circuit reached a conclusion based on the facts before it and the law in existence in May of 1992. Such does not represent a conflict with the Sixth and Seventh Circuits or the Supreme Court of West Virginia. As such, there is no basis for the granting of certiorari on this issue.

CONCLUSION

Based upon the foregoing, respondents Susannah Herring and Melba Sirmon respectfully request that the Petition for a Writ of Certiorari be denied.

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